

**SANITIZED DEC. 04-271 C – BY GEORGE V. PIPER – SUBMITTED FOR
DECISION ON DOCUMENTS ONLY ON 07/07/04 – ISSUED 07/27/04**

SYNOPSIS

**CONSUMERS' SALES AND SERVICE TAX -- BURDEN OF PROOF MET
IN PART** -- Estimated assessment will be revised only as to those items for which documentary evidence is presented; however, the remainder of the assessment, for which no documentation was presented, will be upheld.

FINAL DECISION

A tax examiner with the Field Auditing Division of the West Virginia State Tax Commissioner's Office conducted an audit of the books and records of the Petitioner. Thereafter, on February 18, 2004, the Director of this Division of the Commissioner's Office issued a consumers' sales and service tax assessment against the Petitioner. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. The assessment was for the period of January 1, 2001 through June 30, 2003, for tax, interest, through October 31, 2003, and additions to tax, for a total assessed liability. Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked April 12, 2004, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002].

At the prehearing conference scheduled in this matter Petitioner decided to waive, in writing, his right to a hearing, opting instead for a decision based upon the documentary evidence that he could produce.

FINDINGS OF FACT

1. Because Petitioner claimed that all of his business records were destroyed in a flood, the tax auditor estimated Petitioner's yearly receipts subject to the sales tax by relying upon Petitioner's federal income tax returns.

2. At the prehearing conference the Petitioner presented a few tax records which upon examination slightly reduced the overall assessment.

3. Petitioner was informed at the prehearing conference that should he find any additional records between then and the scheduled hearing date, he should send same to the Tax Commissioner's counsel for review, with the understanding that, if applicable, the assessment would be further reduced.

4. Additional evidence was received by the due date and was also applied against the estimated tax liability.

DISCUSSION

The sole issue is whether the Petitioner has shown that the assessment is incorrect and contrary to law, in whole or in part, *see* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

In this case Petitioner presented some records which, when verified, reduced the estimated assessment by only about \$5,000.00. However, no records were presented for the bulk of the audit period.

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to the bulk of the estimated assessment. *See* 121 C.S.R. 1, § 69.2 (Apr. 20, 2003).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment issued against the Petitioner for the period of January 1, 2001 through June 30, 2003, should be and is hereby **MODIFIED** in accordance with the above Conclusions of Law for **revised** tax, interest, on the revised tax, through July 31, 2004, and additions to tax, for a **total revised** liability.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this consumers' sales tax assessment until this liability is fully paid.